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Re: Standard Equipment, Inc., et al. v. The Boeing Co., et al.

Dear Counsel:

Enclosed is a copy of my Memorandum Decision and Order on the motion heard on August 5, 1987. In accordance with past practice, please arrange to have copies distributed to the other parties. I am today filing the original with the Clerk of the Court.

Very truly yours,

John S. Ebel
John S. Ebel

Enclosure

JSE/jm6.6



SEP 17 1987

Superfund Branch

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
AT SEATTLE

STANDARD EQUIPMENT, INC., a
Washington corporation; and
STEWART S. MULLEN, JR.,

Plaintiffs,

v.

THE BOEING CO.; NORTHWEST
STEEL ROLLING MILLS, INC.;
LIQUID WASTE DISPOSAL CO.;
BAYSIDE WASTE HAULING AND
TRANSFER, INC.; et al.,

Defendants.

NO. C84-1129D

MEMORANDUM DECISION AND ORDER
OF SPECIAL MASTER ON MOTION
FOR DETERMINATION OF
REASONABLENESS OF BOEING AND
RELATED SETTLEMENTS

Plaintiffs have moved for an order: (1) determining that certain settlements between plaintiffs and The Boeing Co. and between plaintiffs and other defendants are reasonable pursuant to RCW 4.22.060; (2) dismissing all claims and cross-claims against the settling defendants (with the exception of "LIDCO claims" against certain settling defendants); and (3) establishing offsets (a) of \$4,407,589.50 against plaintiffs' claims related to Western Processing, and (b) of \$14,694.25 against plaintiffs' LIDCO claims.

1 On December 23, 1986, Judge Dimmick entered an order assigning
2 "all future motions for a determination of reasonableness" to the
3 undersigned Special Master. This memorandum decision constitutes my
4 ruling on all issues raised by the settlements which are before the
5 Court. To the extent that any ruling contained herein exceeds the
6 scope of the matters referred to the Special Master by the Order of
7 December 23, 1986, this memorandum decision constitutes the Special
8 Master's recommendation to the Court concerning those issues.

9 Upon motion of the Defense Liaison Committee, both sides were
10 permitted to conduct limited interrogatory, document and deposition
11 discovery with respect to issues raised by plaintiffs' motion.
12 Following completion of discovery, both sides submitted memoranda,
13 affidavits and other evidentiary materials for the Court's con-
14 sideration. A hearing in open court was held on August 5, 1987.
15 Having carefully considered the parties' memoranda, affidavits and
16 other evidentiary submittals, and the arguments of counsel, I make
17 the following findings and conclusions.

18 I.

19 DESCRIPTION OF SETTLEMENTS

20 On three prior occasions, Judge Dimmick has determined the
21 reasonableness of settlements pursuant to RCW 4.22.060. None of the
22 70 previous settlements involved a defendant who had contributed
23 more than one percent of the wastes taken to the Western Processing
24 site. The average volume of the 70 defendants was .066%, and their
25 aggregate volume was less than five percent of the total. The
26 settlements ranged from a low of \$519.70 to a high of \$75,000.

1 On December 31, 1986, plaintiffs entered into a settlement
2 agreement with Boeing. Plaintiffs later settled with 81 additional
3 defendants, which for the purposes of this motion consist of two
4 separate groups, the "Boeing Group" and the "Non-Boeing Group." The
5 Boeing Group consists of 41 settling defendants who, like Boeing,
6 have signed the Phase II Consent Decree in the federal enforcement
7 action pending before Judge McGovern. The Boeing Group settlements
8 involved essentially the same payment, on a per gallon basis, as the
9 Boeing settlement. The settlements with the Non-Boeing Group
10 reflected a higher payment on a per gallon basis, and were based on
11 the same formula used in the 70 earlier settlements.

12 The Boeing settlement agreement provided that Boeing would pay
13 plaintiffs \$3.75 million; that Standard Equipment would convey the
14 11.5 acres of its property adjacent to the Western Processing site
15 to Boeing; that Boeing would hold plaintiffs harmless from any
16 liability for cleanup costs on the 11.5 acres; that Boeing would
17 reimburse Standard for some \$17,659 in real estate closing costs;
18 and that plaintiffs would withdraw their objections to the Phase II
19 Consent Decree. In addition, plaintiffs agreed to extend settlement
20 offers to 90 additional defendants who had signed the Phase II
21 Consent Decree (the Boeing Group), offering to settle for essen-
22 tially the same per gallon payment as paid by Boeing. If accepted,
23 the 90 additional offers would have produced an additional \$511,500

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1 in settlement payments to plaintiffs. Forty-one offers were
2 accepted, representing an aggregate settlement total of \$371,650.^{1/}

3 The formula plaintiffs used to settle with the 40 Non-Boeing
4 Group defendants was essentially the same as that used in the pre-
5 vious settlements which Judge Dimmick found reasonable in her orders
6 of June 4, 1986 and December 23, 1986. The formula multiplied each
7 defendant's percentage contribution of waste to the Western
8 Processing site times a damage figure of \$10 million, and then added
9 a specified amount to reimburse plaintiffs for attorneys' fees.

10 Plaintiffs represent that the \$3.75 million Boeing settlement
11 was not based upon any specific volumetric formula. Indeed, there
12 is considerable dispute concerning the amount of waste contributed
13 by Boeing to the Western Processing site. Boeing records apparently
14 confirm that Boeing contributed at least 51.6%, but plaintiffs and
15 other defendants in this action, and the United States Government in
16 the federal enforcement action, have asserted that Boeing's share is
17 greater than 51.6%. In the lengthy negotiations which resulted in
18 the Phase II Consent Decree, Boeing agreed to a compromise figure of
19 55 percent.

20 Plaintiffs represent that the total gallons of the Boeing Group
21 defendants (including Boeing at 55%)) was some 16,705,000 gallons,

22
23 ^{1/} The Boeing settlement agreement required each of the additional
24 offerees to disclose any involvement with the LIDCO site and their
25 volume contributions of waste to the Western Processing site, the
26 latter of which could not differ materially from volumes listed in
the Boeing settlement agreement, and provided that, at plaintiffs'
option, the settlement would not extinguish the offeree's liability
on plaintiffs' LIDCO claims.

1 and that the Boeing Group settlements would therefore equate to a
2 payment of 25.61603 cents per gallon. Barrett Aff. ¶7. The
3 Non-Boeing Group settlements and the earlier settlements, by
4 contrast, required higher per gallon payments.^{2/}

5 II.

6 ISSUES BEFORE THE COURT

7 Based upon the memoranda, affidavits and other materials filed
8 by plaintiffs, the Defense Liaison Committee and certain other
9 defendants, the following issues are presented for decision:

10 1. Were the Boeing and Boeing Group settlements
reasonable within the meaning of RCW 4.22.060?

11 2. May the court establish an offset against
12 plaintiffs' LIDCO claims based upon certain settlement
13 agreements' allocation of a portion of the gross settle-
ment amount to the LIDCO claims; and are the amounts
allocated to the LIDCO claims unreasonable?

14 3. Should the court dismiss contribution cross-
15 claims under the Comprehensive Environmental Response
and Liability Act of 1980 ("CERCLA"), 42 U.S.C.
16 §§ 9601-9651, against the settling defendants?

17 4. Should the court dismiss contribution cross-
18 claims under the Racketeer Influenced and Corrupt
Organization Act ("RICO"), 18 U.S.C. § 1961 et seq.
19 against the settling defendants?

20 No challenge has been made to the reasonableness of the Non-Boeing
21 Group settlements.

22
23
24 ^{2/} For example, plaintiffs settled with CF Tank Lines/Matlack for
25 \$3,764.12, or 34.72435 cents per gallon. Because of differences in
26 the way attorneys' fees were computed, the amounts paid by the
Non-Boeing Group defendants and the earlier settling defendants are
not uniform.

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III.

REASONABLENESS OF SETTLEMENTS

A. Applicable Law.

The determination of reasonableness of the settlements at issue is governed by RCW 4.22.060(2), which provides:

A release, covenant not to sue, covenant not to enforce judgment or similar agreement entered into by a claimant and a person liable discharges that person from all liability for contribution, but it does not discharge any other persons liable upon the same claim unless it so provides. However, the claim of the releasing person against other persons is reduced by the amount paid pursuant to the agreement unless the amount paid was unreasonable at the time of the agreement in which case the claim shall be reduced by an amount determined by the court to be reasonable.

In Glover v. Tacoma General Hospital, 98 Wn.2d 708 (1983), the Washington Supreme Court rejected the argument that the only real issue under RCW 4.22.060(2) is whether the settling parties acted in good faith. The court held that such a test would disregard other purposes of the statute, "for instance, insuring a more equitable distribution of payment among defendants according to liability." However, the court also held that the statute does not require a settlement to strictly reflect the settling defendant's relative liability. The court reasoned that such an approach is impractical since it would either require a mini-trial to determine each defendant's relative liability, or would require the trial court to postpone approval of the settlement until trial or later. The court

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1 found that the first alternative would be cumbersome, and that the
2 second would impose a potential hardship on plaintiffs.

3 The Glover court enunciated several factors which the trial
4 court should consider in making the reasonableness determination
5 required by RCW 4.22.060:

6 [T]he releasing person's damages; the merits of the
7 releasing person's liability theory; the merits of the
8 released person's defense theory; the released person's
9 relative faults; the risks and expenses of continued
10 litigation; the released person's ability to pay; any
evidence of bad faith, collusion, or fraud; the extent of
the releasing person's investigation and preparation of
the case; and the interests of the parties not being
released.

11 98 Wn.2d 717. No one factor controls. Id. at 718. Each factor
12 is to be judged based upon facts and circumstances as they were
13 known and as they existed on the date the settlement agreement was
14 entered into, and not on the basis of subsequent information.
15 RCW 4.22.060(2). When the settling parties have proffered evidence
16 in support of a determination that the settlement is reasonable, "it
17 is incumbent upon a party having a significant interest in seeing
18 that the settlement is found to be unreasonable to present some evi-
19 dence to controvert the settling parties' evidence." Pickett v.
20 Stevens-Nelsen, Inc., 43 Wn. App. 326, 332-33 (1986).

21 B. The Boeing Settlement.

22 1. Amount of the Settlement.

23 Before considering the reasonableness of the Boeing settle-
24 ment, the amount of the settlement must be addressed. The Defense
25 Liaison Committee argues that plaintiffs actually received, and
26

1 Boeing actually paid, less than \$3.75 million because Standard
2 Equipment conveyed 11.5 acres of allegedly valuable land to Boeing,
3 and that the offset against plaintiffs' claims should be increased
4 because plaintiffs benefitted from Boeing's agreement to hold plain-
5 tiff harmless from liability for cleanup costs relating to the
6 11.5 acres.

7 Plaintiffs contend that the land conveyed to Boeing was
8 worthless. With respect to the hold harmless provision, plaintiffs
9 state that if and to the extent they had potential liability for
10 cleanup of the land, their claims against the defendants would
11 simply be increased. Plaintiffs argue that defendants already have
12 the benefit of Boeing's hold harmless agreement because the hold
13 harmless agreement limits plaintiffs' claims against the remaining
14 defendants, and that to increase the offset would constitute double
15 counting.

16 I find it unnecessary to resolve the issue of the value of
17 the land conveyed to Boeing. It is true that if the land had some
18 value, the net amount that plaintiffs received and Boeing paid would
19 be less than \$3.75 million. However, the controlling fact is that
20 plaintiffs concede that the offset should be established at
21 \$3.75 million, irrespective of the land's value. A finding con-
22 cerning the value of the land will not affect the amount of the off-
23 set.

24 Moreover, even if plaintiffs had not conceded the amount of
25 the offset, I conclude that the weight of the evidence indicates
26 that the land had no value. The central thrust of plaintiffs'

1 lawsuit is that pollution emanating from the Western Processing site
2 has contaminated Standard Equipment's property and rendered it
3 worthless. Plaintiffs submitted an affidavit of Gary L. Volchok, a
4 real estate broker experienced in the development and sale of raw
5 land in the Kent Valley area. In Mr. Volchok's opinion the
6 11.5 acres were unsaleable and without value on the date of the
7 settlement. He stated that in his experience land developers or
8 users will not even consider buying a property if there is the
9 slightest possibility that the property may be contaminated, and
10 that in his experience lenders would not have loaned money on this
11 land. He concluded that "I could not have given this property away
12 on December 31, 1986 due to the tremendous liability that might
13 exist for a new purchaser and owner of this property."

14 Plaintiffs also submitted a declaration of Dr. Adrian
15 Smith, a professional hydrogeochemist. Dr. Smith expressed the
16 opinion that as of the date of the settlement the Phase II Consent
17 Decree's plan for cleaning up the Western Processing contamination
18 was technically deficient and would not have effected a satisfactory
19 or reasonable cleanup of Areas III and V, and that there was no
20 reason to believe that the Plan would be modified to resolve its
21 technical deficiencies. He stated that the estimate of costs, as of
22 December 31, 1986, for adequate cleanup of Standard's property to an
23 uncontaminated condition were in the range of \$4,250,000-\$5,500,000,
24 exclusive of operational costs or contractors' markups for insurance
25 and bonding, and exclusive of the costs of an additional water
26 treatment plant. He also testified that sampling results indicate

1 that there is contamination outside the Western Processing Superfund
2 site which could contaminate the Standard Equipment property but
3 which would not be cleaned up under the Phase II Consent Decree.
4 Finally, he testified that, as of December 31, 1986, the Phase II
5 work plan faced substantial opposition from non-settling parties,
6 and it was not known whether the proposed work plan would be
7 approved.

8 The objecting defendants submitted no affidavits or testi-
9 mony of any appraiser or real estate professional concerning the
10 value of the 11.5 acres, and submitted no evidence which contradicts
11 Dr. Smith's affidavit. They nonetheless argued that the land had
12 substantial value because, following the conveyance to Boeing,
13 Stewart Mullen, Standard's president, signed a real estate excise
14 tax affidavit listing the gross sale price of the property as
15 \$2,100,000, and because Boeing placed a book value of \$1 million on
16 the land after the conveyance. The Defense Liaison Committee
17 further argued that Boeing and the other signers of the Phase II
18 Consent Decree were already obligated to clean up the land, and that
19 most of the property conveyed is believed by the government as a
20 result of its testing program to be sufficiently clean so that no
21 remedial action is required.

22 In response to these arguments, plaintiffs submitted the
23 affidavits of Mr. Mullen and Andrew Gay, Boeing's Director of
24 Corporate Facilities. Mr. Gay's affidavit states that Boeing's
25 \$1 million book valuation was for internal purposes only, and that
26 it did not relate to the true market price of the property or take

1 into consideration the costs of cleaning the property, the extent of
2 its contamination, the impact of the proposed Phase II cleanup, or
3 the stigma associated with the fact that the land was in some cases
4 part of, and in other cases adjacent to the Western Processing
5 Superfund site. Gay Aff. Mr. Mullen, in his affidavit, states that
6 he submitted the real estate excise tax affidavit showing a
7 \$2,100,000 sale price because he wanted to avoid the possibility
8 that the county auditor would refuse to record the deed in the
9 calendar year 1986. He testified that he was concerned that if the
10 tax affidavit showed a sale price of zero the King County Auditor
11 would not accept the excise tax affidavit, which would prevent the
12 transaction from closing on December 31, 1986. He states that he
13 did not know the value of the property for tax purposes, and that he
14 elected to have Standard pay excise tax on a valuation of
15 \$2.1 million to be certain that the auditor would accept the tax
16 affidavit.^{3/}

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18 3/ Mr. Mullen's affidavit also states that on December 31, 1986, he
19 was convinced that the work plan embodied in the proposed Phase II
20 Consent Decree would not adequately clean up Standard's property;
21 that even if the plan had worked as envisioned, contaminant levels
22 would be far above acceptable background levels for such contami-
23 nants; that he did not believe, based on advice from his consul-
24 tants, that the plan would accomplish even the goals stated in the
25 plan; that on December 31, 1986, the prospects for the 11.5 acres
26 being cleared up were unacceptable; that on December 31, 1986, there
was no certainty that the proposed plan would be approved; that
irrespective of the efficiency of the cleanup plan, Standard's prop-
erty was likely to have extraction wells on it for up to 30 years;
and that he believed the portion of Standard's property west of
Area V had not been properly tested for contamination, and that con-
tamination extended far beyond what EPA recognized in its delinea-
tion of Area V.

1 In oral argument, counsel for plaintiffs speculated that
2 the land, although worthless to plaintiffs, might have some value to
3 Boeing because Boeing has facilities in the area and may be able to
4 use the property for some purpose such as the storage of trucks.
5 While, in this sense, the land may be of some practical value to
6 Boeing, in applying RCW 4.22.060 the court should focus on what the
7 plaintiffs received under the settlement agreement. The question is
8 whether the plaintiffs made a reasonable settlement. Since the
9 setoff established will reduce the plaintiff's claim against other
10 defendants, it would be inequitable to penalize a plaintiff based
11 not on what the plaintiff has actually received in a settlement but
12 based on a subjective valuation of benefits received by a settling
13 defendant which are unique to that defendant and which do not
14 correspond to a benefit received by the plaintiff.

15 Dr. Smith's affidavit establishes that the property was ser-
16 iously contaminated, and that plaintiffs believed that the proposed
17 Phase II cleanup (which had not yet been approved) would be inade-
18 quate to effect an adequate cleanup of the property. Mr. Volchok's
19 affidavit establishes that the property had market value on the date
20 of the settlement because of the contamination. Although the evi-
21 dence concerning the real estate tax affidavit and Boeing's internal
22 valuation is significant standing alone, the import of that evidence
23 is ambiguous in view of the explanations of the Mullen and Gay affi-
24 davits. On the other hand, there is no evidence in the record which
25 effectively rebuts the conclusions of the Volchok and Smith affida-
26 vits. I therefore conclude that the weight of the evidence is that

1 the property had no value, and that Standard's conveyance of the
2 land to Boeing, even if otherwise relevant, did not reduce the
3 amount received by plaintiffs.^{4/}

4 2. Reasonableness of Boeing Settlement.

5 The objecting defendants agree that the reasonableness of
6 the Boeing settlement is to be judged by reference to the Glover
7 factors. However, they make one argument which cuts across the
8 Glover factors. They argue that because plaintiffs entered into
9 earlier settlements utilizing a volumetric formula applied against a
10 \$10 million damage figure (the damages pleaded in plaintiffs'
11 complaint), it was unreasonable per se for plaintiffs to settle with
12 Boeing on a basis which would yield lower payments per gallon.^{5/}

13 The Court declared the earlier settlements reasonable in
14 the circumstances then before the court. However, the court's prior
15 orders do not address the question whether lesser settlements would
16 have been unreasonable. Plaintiffs contend that in reviewing the
17

18 4/ I also conclude that the amount of the offset should not be
19 increased above \$3.75 million by reason of Boeing's agreement to
20 hold plaintiffs harmless from potential liability for cleanup costs
21 relating to the 11.5 acres. No showing has been made of the amount,
22 extent or likelihood of such potential liability. To increase the
23 offset due to the hold harmless agreement would create a double
24 benefit for the nonsettling defendants. To the extent the plain-
25 tiffs are liable for cleanup costs, those costs incurred by plain-
26 tiffs would increase plaintiffs' claimed damages. Since the hold
harmless agreement will preclude such damages from being asserted,
the nonsettling defendants already have the benefit of the hold
harmless agreement without an increased offset.

5/ The objecting defendants in fact contend that the formula should
utilize a \$12 million damage figure, since plaintiffs' Second
Amended Complaint alleges \$12 million in damages.

1 Boeing settlement, the court can and should consider the large size
2 of the settlement in gross dollar terms and the dominant role of
3 Boeing in the defense of the case. They suggest that a good faith
4 arms' length settlement of such a large size, with a dominant and
5 vigorous defendant, may be reasonable even though it may represent
6 less on a per gallon basis than settlements with other parties with
7 smaller volumes or defense roles.

8 Glover rejected an interpretation of RCW 4.22.060 which
9 would merely look at the settling parties' good faith, recognizing
10 that RCW 4.22.060 has, as one of its purposes, a fair apportionment
11 of liability among defendants. However, nothing in the statute
12 requires absolute uniformity of treatment of all defendants. The
13 Glover court rejected an interpretation of RCW 4.22.060 which would
14 have delayed reasonableness determinations until trial, even though
15 such a system would offer the best means of fairly apportioning
16 liability.

17 RCW 4.22.060 does not constrain the Court to evaluate a
18 settlement solely by reference to earlier settlements. Such a rule
19 would render the statutory process and the Glover factors meaning-
20 less, and deprive the trial court of the discretion it is clearly
21 intended to have. Moreover, it would have the potential of inhibit-
22 ing settlements, particularly where, as here, a plaintiff has made
23 early settlements with de minimis or minor defendants for amounts
24 which are small in gross dollar terms but large in relation to the
25 defendants' actual involvement.

26 . . .

1 The argument advanced by the non-settling defendants
2 ignores the purpose of RCW 4.22.060. The statute is not designed to
3 guarantee early settlers that subsequent settlers will not have to
4 pay less; the statute seeks instead to establish a reasonable offset
5 for the benefit of defendants who have not settled. So long as the
6 settlement is a reasonable reflection of the Glover factors, the
7 non-settling defendants are protected regardless whether other
8 defendants may have paid proportionately more in earlier settle-
9 ments. Indeed, if earlier settlements provided for higher payments
10 per gallon, the non-settling defendants were benefited by the higher
11 offset there realized.

12 Earlier settlements are a factor to consider, but they are
13 only one factor. Different circumstances may lead to different
14 results. For example, the earlier settlements involved defendants
15 who had very small (in most cases de minimis) exposure and hence a
16 small interest in defending the case vigorously. On the other hand,
17 the Boeing settlement involved a defendant with a demonstrated
18 interest in defending the case very vigorously, and the ability and
19 willingness to do so.

20 Nor is a settlement unreasonable per se unless it requires
21 a defendant to pay its "fair" share of the full damages alleged in
22 the plaintiffs' complaint. Nothing in RCW 4.22.060 indicates that
23 settlements must be justified only in terms of pleaded damages.
24 Indeed, Glover clearly requires the trial court to focus on provable
25 damages, and recognizes that damages awarded may be (and frequently
26 are) less than the damages alleged in the complaint or sought at

1 trial. The non-settling defendants will no doubt contend at trial
2 that plaintiffs' damages are much less than \$10 million. To require
3 offsets to be granted on the basis of pleaded damages alone, without
4 reference to the realities of proving damages, would impose a
5 hardship on plaintiffs and discourage settlements.

6 Having considered the record before me and the various fac-
7 tors outlined in Glover, I find that plaintiffs' settlement with
8 Boeing is reasonable within the meaning of RCW 4.22.060(2).

9 This has been a difficult and expensive case for the plain-
10 tiffs to prepare and prosecute. A great deal of technical and
11 scientific evidence will be required to establish the fact, extent
12 and origin of the contamination of plaintiffs' property. Neither
13 liability nor damages is conceded, and neither is free from risk.
14 Several of plaintiffs' liability theories require extension of
15 existing state law. Other of plaintiffs' claims (e.g., the private
16 claim under CERCLA) involve new areas of the law where private par-
17 ties' rights are not well developed and in which plaintiffs' recov-
18 erable damage or cleanup remedy may be limited. Plaintiffs' RICO
19 claims have been the subject of repeated motions for summary judg-
20 ment, including one such motion which is now pending. Further,
21 plaintiffs point out that there have been intense lobbying efforts
22 by groups seeking legislation to limit the application of RICO
23 retroactively, and several such bills are now pending before the
24 Congress.

25 Plaintiffs' damages include claims for lost value of plain-
26 tiffs' land, lost value of plaintiffs' business, and losses of busi-

1 ness income. These kinds of damages are not capable of precise
2 proof, and are certain to be seriously challenged by defendants as
3 to their existence, causation and amount.^{6/}

4 The plaintiffs faced considerable risk and expense in con-
5 tinued litigation with The Boeing Company. Boeing is one of the
6 world's largest companies and has played an active, vigorous and
7 capable role in the defense of this case. Whereas other settlements
8 involved little or no reduction in the risk of continued litigation,
9 the risk and expense to plaintiffs of continued litigation with
10 Boeing would have been greater than the risk and expense of con-
11 tinued litigation after the Boeing settlement.^{7/}

12 The settlement was negotiated through intense, arms' length
13 negotiations. There is no suggestion that the settlement was in any
14 way collusive or in bad faith. Since counsel for plaintiffs and
15 Boeing have each investigated and prepared their case thoroughly,
16 there is little risk that the settlement is unreasonable because
17 either side was poorly informed.

18 The objecting defendants argue that Boeing should have paid
19 more because: (1) there is evidence that Boeing may have contri-
20 buted more than 55 percent of the toxic wastes delivered to the
21 Western Processing site; (2) there is evidence that Boeing personnel

22
23 ^{6/} For example, on this motion the objecting defendants have as-
serted that the value of plaintiffs' land has not been destroyed.

24 ^{7/} Plaintiffs' counsel submitted an affidavit, which was not con-
25 tested, stating his estimate that plaintiffs would have incurred
26 additional fees and costs in excess of \$1 million to take the case
to trial against Boeing.

1 were aware of poor waste handling practices by Western Processing;
2 and (3) the toxicity and physical effects of the Boeing wastes
3 contributed to the Western Processing exceeded that of wastes
4 contributed by other defendants.

5 With respect to Boeing's volume, some Boeing documents
6 indicate that certain Boeing wastes taken to the Western Processing
7 site, particularly in the 1960's, may not have been taken into
8 account in computing Boeing's volume share of the wastes.
9 Plaintiffs respond that Boeing has refused to acknowledge more than
10 a 51.6 percent contribution, and that neither the U.S. government
11 nor the other parties in the federal CERCLA action could establish
12 or obtain Boeing's agreement to more than a 55 percent compromise
13 figure. They argue that plaintiffs should not be held to a higher
14 standard.

15 While a party's volume is not necessarily reflective of
16 fault, it has been used in other cases as a rough measure of respon-
17 sibility, and is an appropriate subject for inquiry here. Based on
18 the record before me, the 51.6 percent volume shown by Boeing's
19 delivery records appears to understate the actual Boeing volume.
20 However, I do not find that a volume in excess of 55 percent must be
21 attributed to Boeing, as the objecting defendants argue. While
22 there is some evidence which may indicate a larger percentage, the
23 evidence is vigorously disputed by Boeing, and the Government agreed
24 to a 55 percent figure for purposes of the Phase II Consent Decree.

25 The objecting defendants brought forth some evidence which
26 suggests that Boeing officials were aware of poor waste handling

1 practices by Western Processing, yet continued to deliver wastes to
2 Western Processing because it was less expensive and more convenient
3 than other available waste disposal methods. Although this evidence
4 was not controverted, the objecting defendants made no effort to
5 quantify the culpability of Boeing officials, to relate the
6 culpability of Boeing to that of the other defendants, or to explain
7 the significance of this evidence with respect to Boeing's ultimate
8 liability. Analysis of the relative fault of Boeing requires an
9 analysis of the evidence with respect to the elements of plaintiffs'
10 claims.^{8/} Since neither side has provided such an analysis, I can-
11 not conclude that Boeing's relative fault is any greater than that
12 of the other defendants, and likewise cannot conclude that Boeing
13 has defenses which are any more meritorious than those of other
14 defendants.

15 The objecting defendants have proffered evidence which
16 relates the toxicity and physical effects of Boeing wastes to that
17 of the other defendants' wastes. Dr. G. Graham Allan submitted an
18 affidavit describing the results of an analysis which compared the
19 quantities, toxicities and physical effects of wastes contributed by
20 all parties to the Western Processing site. He states that the
21 analysis establishes that, taking into account quantity, toxicity

22
23
24 ^{8/} For example, a defendant's liability may not turn on the kind of
25 evidence proffered by the objecting defendants. Fault is not a
26 generalized concept, but depends upon an application of the elements
of the claim for relief to the facts as they are shown to exist.

1 and physical effects of wastes, Boeing's "share" of responsibility
2 should be 65.49 percent.

3 Neither side directly addressed the legal significance of
4 higher toxicity and greater physical effects on the relative liability
5 of the defendant who contributed them. However, plaintiffs did
6 not refute Dr. Allan's affidavit, and it is apparent that in a case
7 such as this, volume, toxicity and physical effects of wastes are
8 related to the plaintiffs' claimed injury.

9 Dr. Allan's study, coupled with the other evidence of
10 Boeing's knowledge, suggests that the 55 percent share attributed to
11 Boeing by volume may understate Boeing's relative fault to some
12 extent. However, on the record before me it is impossible to deter-
13 mine how much greater, if any, the offset should be. The details of
14 Dr. Allan's analysis are not before me, and therefore his conclu-
15 sions of a 65.49 percent responsibility cannot be accepted without
16 qualification.^{9/} Moreover, neither side has addressed the legal
17
18

19 ^{9/} Dr. Allan states that his analysis was based on a formula
20 "developed in connection with cleanup of the Petro Processors super-
21 fund site in Louisiana." The formula was not further identified or
22 explained. Nothing in the record indicates whether the formula was
23 actually used by the court or the parties as the basis for appor-
24 tioning liability in the Petro Processors matter, and there is no
25 evidence which establishes whether the Petro Processors situation
26 was comparable to the case before the court. Dr. Allan's affidavit
also indicates that the formula reached its result by a process of
weighting various factors. The factors were described only in very
general terms without elaboration, and there was no explanation of
how the factors were weighted. Thus, it is impossible on the evi-
dence before me to evaluate the propriety of the analysis as applied
to this case.

1 significance of volume, toxicity and physical effects on a defen-
2 dant's relative liability, although both sides appear to agree they
3 have some significance.^{10/}

4 After careful consideration of all the evidence before me,
5 I conclude that the Boeing settlement is reasonable. If Boeing's
6 volume is assumed to be 51.6 percent, the \$3.75 million paid by
7 Boeing would equate to a proportionate share of an overall recovery
8 of \$7,267,441; if its volume is assumed to be 55 percent, the Boeing
9 payment would equate to a proportionate share of an overall recovery
10 of \$6,818,181. In a difficult and expensive case such as this, in
11 which many elements of plaintiffs' claimed damages are disputed as
12 to liability and amount, it is not unreasonable for a plaintiff to
13 settle on the basis of a recovery of \$6.8 - \$7.2 million when the
14 plaintiff has pleaded damages of \$10 - \$12 million.

15 C. The Boeing Group Settlements.

16 The settlement offers to the Boeing Group defendants reflected
17 the same financial terms as plaintiffs' settlement with Boeing.
18 Approximately 68 percent of the Boeing Group offerees (by volume of
19
20

21
22 ^{10/} Even if the court had sufficient information to accept
23 Dr. Allan's conclusion of 65.49 percent responsibility for Boeing,
24 for purposes of establishing an offset against plaintiffs' claims,
25 the 65.49 percent share should be measured not against plaintiffs'
26 pleaded damages, but against the \$6.8-\$7.2 million which I find is a
reasonable overall recovery for settlement purposes. In other
words, even if the court could accept Dr. Allan's conclusions, the
offset against plaintiffs' claims by reason of the Boeing settlement
should be established at \$4,453,320 - \$4,715,280.

1 wastes contributed to the site) accepted the settlement offers.

2 Most had contributed small amounts of wastes, and the settlement
3 amounts were therefore small in relation to the overall damages.^{11/}

4 Plaintiffs made no separate showing to support the reasonable-
5 ness of the Boeing Group settlements, relying on the same showing
6 as made with respect to the Boeing settlement. Some of the factors
7 supporting the reasonableness of the Boeing settlement are not
8 present with respect to the Boeing Group settlements. For example,
9 none of the Boeing Group defendants had the same stake or interest
10 in defending the case as Boeing, since their volumetric contribu-
11 tions were insignificant compared to that of Boeing. Moreover,
12 because the Boeing settlement agreement required plaintiffs to
13 tiffs to extend offers to the Boeing Group defendants, there were no
14 direct negotiations between plaintiffs and these defendants.

15 Although the issue is not without difficulty, I conclude that
16 the Boeing Group settlements reflect a reasonable compromise of the
17 plaintiffs' claims against the Boeing Group defendants. As noted
18 above, a settlement is not unreasonable under RCW 4.22.060 merely
19 because other defendants paid more. Although non-settling defen-
20 dants have an interest in seeing that the offset established by
21 reason of a settlement realistically reflects the settling defen-

22
23
24 ^{11/} The Pittsburgh & Midway (\$162,520.75), Western Pneumatic Tube
25 (\$108,609.78) and Morton Thiokol (\$24,106.06) settlements were by
26 far the largest of the Boeing Group settlements. The next largest
was \$14,409.83 (The Flecto Co.), and the others ranged from less
than \$100 to a few thousand dollars.

1 dants' relative responsibility, here the non-settling defendants
2 have provided no basis on which to establish a higher offset except
3 for the fact that others paid more.

4 As desirable as uniform treatment of similarly situated defen-
5 dants may be, I cannot conclude that these settlements are unreason-
6 able simply because they represent lower amounts than paid by
7 others. The Boeing Group settlements represent proportionate shares
8 of an overall recovery of \$6.8 - \$7.2 million, which I have pre-
9 viously found to be a reasonable basis on which to settle plain-
10 tiffs' claims. If others paid higher amounts, the non-settling
11 defendants are not prejudiced because, under RCW 4.22.060, they
12 benefit from the higher offsets.

13 D. Non-Boeing Group Settlements.

14 1. Western Processing Claims.

15 The Non-Boeing Group settlements were based on the same
16 volumetric formula as the 70 settlements previously declared reason-
17 able by Judge Dimmick. No objections have been presented to these
18 40 settlements, and I find them reasonable for the same reasons as
19 set forth in previous orders of the Court.

20 2. LIDCO Claims.

21 Five of the Non-Boeing Group settlements included the
22 payment of monies for settlement of plaintiffs' claims related to
23 the LIDCO site. The five settlement agreements totalled \$22,447.77
24 in the aggregate, and allocated \$14,694.25 to settlement of the
25 LIDCO claims. See Affidavit of Paul A. Barrett, ¶8.
26

1 Plaintiffs request an order dismissing contribution cross-
2 claims relating to plaintiffs' LIDCO claims against these five
3 settling defendants. The objecting defendants argue (1) that
4 RCW 4.22.060 does not permit the court to establish the amount of
5 offsets as to particular claims (i.e., that the statute requires
6 that the full amount of the settlement funds be applied to offset
7 all claims without differentiation); and (2) that the \$14,694.25
8 allocated to settlement of the LIDCO claims is unreasonable.

9 Plaintiffs' LIDCO claims relate to contamination of
10 discrete portion of plaintiffs' property. Hence, the LIDCO claims
11 represent separate claims for injury, and not simply alternate
12 theories of liability for essentially the same injury. At least in
13 this circumstance, I find nothing in RCW 4.22.060 which precludes
14 the court from addressing the reasonableness of the settlement of
15 those claims and establishing an offset relating to them. The
16 settling LIDCO defendants having paid certain amounts to settle the
17 LIDCO claims as against them, the question under the statute is
18 simply whether the settlement amounts are reasonable.

19 The LIDCO claims are not as well developed as plaintiffs'
20 other claims due to a relative lack of available information con-
21 cerning the extent of contamination of the LIDCO site. Although
22 they acknowledge that it is difficult to determine the volume of
23 waste handled at the LIDCO site, there is no evidence in the record
24 which suggests that something in excess of 5 million gallons may
25 have been involved. The objecting defendants have offered no
26 contrary evidence.

1 The five LIDCO settlements involve defendants whose volume
2 contributions to the LIDCO site were de minimis. The settlements
3 reflect a payment of \$2.65 per gallon by each defendant. On a volu-
4 metric basis, the LIDCO settlements represent payments by these five
5 defendants of a proportionate share of more than \$13 million. I
6 therefore find that the settlements of the LIDCO claims are reason-
7 able within the meaning of RCW 4.22.060.

8 IV.

9 EFFECT OF SETTLEMENT ON CERCLA CONTRIBUTION AND CROSSCLAIMS

10 Plaintiffs have settled CERCLA claims against certain defen-
11 dants. Since the CERCLA claims are brought under a federal statute,
12 the settlements raise the following issues: (1) Does RCW 4.22.060
13 apply so that contribution cross-claims under CERCLA against the
14 settling defendants should be dismissed? (2) If RCW 4.22.060 does
15 not apply, should the CERCLA contribution claims be dismissed under
16 federal law?

17 As originally enacted, CERCLA did not expressly provide a right
18 of contribution. However, the courts generally held that there was
19 such a right as a matter of federal law. In the Superfund
20 Amendment and Reauthorization Act of 1986, 42 U.S.C. § 9671 et seq.
21 ("SARA"), Congress amended CERCLA to provide for contribution, and
22 to a certain extent defined its form in CERCLA § 113(f)(1), as
23 follows:

24 Any person may seek contribution from any other
25 person who is liable or potentially liable under
26 section 107(a), during or following any civil action
under section 106 or under section 107(a). Such claims
shall be brought in accordance with this section and the

1 Federal Rules of Civil Procedure, and shall be governed
2 by Federal law. In resolving contribution claims, the
3 court may allocate response costs among liable parties
4 using such equitable factors as the court determines are
5 appropriate.

6 With respect to the effect of settlements on contribution
7 rights, SARA provides that in an action brought by the government,
8 a settling defendant is released from liability for contribution and
9 the government's claims against the non-settling defendants are
10 reduced or offset by the amount of the settlement:

11 (2) SETTLEMENT.--A person who has resolved its
12 liability to the United States or a State in an admini-
13 strative or judicially approved settlement shall not be
14 liable for claims for contribution regarding matters
15 addressed in the settlement. Such settlement does not
16 discharge any of the other potentially liable persons
17 unless its terms so provide, but it reduces the poten-
18 tial liability of the others by the amount of the
19 settlement.

20 CERCLA § 113(f)(2). However, SARA is silent concerning the effect
21 of a partial settlement of a private CERCLA action on contribution
22 claims.

23 CERCLA § 113(f)(1), added by SARA, provides that contribution
24 claims "shall be governed by federal law," and that "in resolving
25 contribution claims the court may allocate response costs among
26 liable parties using such equitable factors as the court determines
are appropriate." Thus, federal common law governs the issue before
the court. Plaintiffs and Boeing argue that federal common law
should incorporate state law, and that the court should thus apply
RCW 4.22.060 to determine the effect of settlements on the CERCLA
contribution claims. Under RCW 4.22.060, contribution claims
against the settling defendants would be dismissed. The non-

1 settling defendants argue that federal common law should not incor=
2 porate RCW 4.22.060 because a uniform federal rule is necessary, and
3 that the court should defer ruling on all contribution claims (i.e.,
4 defer allocating response costs among all liable parties) until
5 after trial. The objecting defendants also argue that this court,
6 in prior rulings, has already ruled that federal contribution claims
7 should not be dismissed against settling defendants.

8 The Court's orders of September 3 and 18, 1985, which approved
9 plaintiffs' settlement with Sea-Land Freight Services, Inc.,
10 discussed the issue of CERCLA contribution rights. At the time,
11 plaintiffs' CERCLA claim had been dismissed by Judge McGovern as not
12 yet ripe, so there was no CERCLA claim pending, and neither the
13 Sea-Land settlement nor any earlier settlements involved settlement
14 of RICO claims.

15 Judge Dimmick's September 3, 1985 order established the need for
16 a hearing on the reasonableness of the Sea-Land settlement under
17 RCW 4.22.060, and established the procedure for that hearing. In
18 that order, Judge Dimmick concluded that "Washington law requires a
19 hearing and declaration prior to trial, but only as to the reason-
20 ableness of settlement of state claims," and that "it is not
21 necessary for the Court to determine at this time what law governs
22 nonsettling defendants' rights of contribution on the RICO claim or
23 the possible CERCLA claim . . . [or] whether the actual amount of
24 the settlement dictates nonsettling defendants' offset from all
25 liability on federal claims." Order of September 3, 1985, at 4,5.

26 . . .

1 Judge Dimmick's September 18, 1985 order approving the Sea-Land
2 settlement clarified the September 3, 1985 ruling. Noting that it
3 was unclear whether contribution rights exist under either RICO or
4 CERCLA and that there was no CERCLA claim then pending (Order of
5 September 18, 1985, at 3, n.2), the Court stated:

6 Nonsettling defendants' right to contribution on
7 the two possible federal claims is governed by federal
8 common law. It is not necessary at this point, however,
9 to determine what that law is. Nor is it necessary to
10 determine whether there is a right of contribution under
11 either the Racketeer Influenced and Corrupt Organiza-
12 tions Act (RICO), 18 U.S.C. §§ 1961-1968 (1982) or the
13 Comprehensive Environmental Response Compensation and
14 Liability Act (CERCLA), 42 U.S.C. §§ 9601-9651 (1982).^{12/}

15 I conclude from this record that the Court has not yet decided
16 the issue presented here. The Court concluded that federal law
17 would determine the effect of a CERCLA settlement (a finding which
18 SARA has since confirmed), but did not determine the content or
19 effect of federal law since no federal claims were involved. The
20 issue before the Court, then, concerns the content and effect of the
21 federal law.

22 SARA establishes that a right of contribution exists and that
23 its scope and effect are governed by federal law. SARA is silent,
24 however, on what the federal law is or should be. The mere fact
25
26

27 ^{12/} The court's two subsequent reasonableness orders of June 4,
28 1986, and December 23, 1986, determined the effects of the settle-
29 ments on state law claims only. Further consideration of the issues
30 raised by federal claims was not necessary, since none of the sub-
31 sequent settlements involved RICO or CERCLA claims (plaintiffs were
32 not granted leave to reassert their CERCLA claims until after the
33 settlements had been made).

1 that federal common law is to be applied does not mean that a uni-
2 form federal rule must be fashioned:

3 Clearly the fact that federal law governs does not
4 always mean that federal courts should fashion a uniform
5 federal rule, even if the federal question involves the
6 scope of a federal statutory right or the interpretation
7 of a phrase in a federal statute. . . . Frequently,
8 state rules of decision will furnish an appropriate and
9 convenient measure of the governing federal law.

10 Mardan Corp. v. C.G.C. Music, Ltd., 804 F.2d 1454, 1457-58 (9th Cir.
11 1986).

12 The predominant consideration is congressional intent — i.e.,
13 whether Congress intended federal courts to develop their own rules
14 or to incorporate state law. In the absence of some clear congres-
15 sional intent United States v. Kimbell Foods, Inc., 440 U.S. 715
16 (1979), requires the court to apply a three-part test to determine
17 whether federal common law should incorporate state law or whether
18 formulating a federal rule would be appropriate as a matter of judi-
19 cial policy. In Mardan (a case involving a CERCLA contribution
20 claim), the Ninth Circuit described the Kimbell Foods three-part
21 test as follows:

22 In the absence of some clear congressional intent, a
23 court must also decide whether formulating a federal
24 rule would be appropriate as a matter of judicial policy
25 under the three-part test established by Kimbell Foods.
26 Under that test, a court must determine the following:
(1) whether the issue requires "a nationally uniform
body of law"; (2) "whether application of state law
would frustrate specific objectives of the federal
programs"; and (3) whether "application of a federal
rule would disrupt commercial relationships predicated
on state law." . . . If the federal courts determine
that state law should be incorporated as a general
matter, this does not necessarily mean that each and

1 every state rule must be adopted—federal courts should
2 still reject specific state rules that are aberrant or
3 hostile to federal interests.

4 804 F.2d at 1458.

5 There is no clear expression of congressional intent concerning
6 whether a uniform federal rule should be fashioned to determine the
7 effect of settlements on contribution rights under CERCLA. Although
8 Congress explicitly determined the effect of settlements on contri-
9 bution claims in government actions, it was silent as to the effect
10 in private actions. Thus, examination of the Kimbell Foods factors
11 is required.

12 Prior cases have held that a uniform federal rule regarding the
13 scope of liability under CERCLA is necessary. See, e.g., United
14 States v. Chem-Dyne Corp., 572 F.2d 802 (S.D. Ohio 1983). However,
15 the issue of the scope of liability under CERCLA differs from the
16 issue of a settlement's effect on contribution rights. The extent
17 of federal interest in establishing the scope of liability is evi-
18 dent. The federal interest in balancing joint tortfeasors' rights
19 inter se is not obvious.

20 Only one case directly discusses what contribution rule should
21 be applied where fewer than all defendants settle in a CERCLA
22 action. In United States v. Conservation Chemical Co., 628 F. Supp.
23 391 (W.D. Mo. 1985), a pre-SARA government enforcement case, the
24 court, although "not required to address this issue at this time,"
25 set forth three alternative methods of dealing with contribution
26 claims in the context of a settlement:

. . .

1 [T]here are three possible solutions for the situation
2 in which one tortfeasor enters into a settlement
3 agreement that does not purport to be a full satisfac-
4 tion of the injured party's claim. First, the non-
5 settling tortfeasors are still able to obtain
6 contribution against the settling tortfeasor, despite
7 the release. Second, the non-settling tortfeasors are
8 not entitled to contribution unless the release was not
9 given in good faith. Third, the injured party's claim
10 is reduced by the proportionate share of the settling
11 tortfeasor. The first solution was adopted by the 1939
12 Uniform Contribution Act. The second solution was
13 adopted by the 1955 Uniform Contribution Among
14 Tortfeasors Act. The third solution was adopted by the
15 1977 Uniform Comparative Fault Act.

16 U.S. v. Conservation Chemical Co., 628 F. Supp. 391, 401 (W.D.
17 Mo. 1985).

18 Without addressing the threshold question of whether federal
19 law should incorporate state law, the court concluded that
20 federal common law should follow the rule of the Uniform
21 Comparative Fault Act (UCFA), 12 Unif. Laws Annotated 44 (1984),
22 which provides that the injured party's claim should be reduced
23 by the settling tortfeasor's proportionate share of the liability
24 as determined at trial. The court reasoned that the UCFA best
25 carries out the congressional policy that CERCLA liability should
26 be fairly and equitably apportioned among defendants. Id. at
402.

27 In Mardan, a private CERCLA action, the Ninth Circuit held
28 that "a uniform federal rule should not be developed to govern
29 the issue of whether and when agreements between private 'respon-
30 sible parties' can settle contribution rights under section 107

31 . . .

32 . . .

1 [of CERCLA]."^{13/} Holding that a uniform federal rule need not be
2 established merely because federal law controls, and finding no
3 clear expression of congressional intent, the court concluded
4 that applying state law would not frustrate CERCLA's objectives
5 because agreements apportioning liabilities between private par-
6 ties are essentially tangential to the enforcement of CERCLA's
7 liability provisions. 804 F.2d at 1459. The court reasoned that
8 commercial enterprises normally look to state law for the effect
9 of indemnification provisions, that disuniformity of rules would
10 not impose any particular burden, and that cases expressing a
11 need for uniform rules of liability under Section 107 of CERCLA
12 are inapposite to the issue of whether a uniform rule is required
13 for the interpretation of contractual agreements to indemnify for
14 CERCLA liability. Id. at 1458-59.

15 It is clearly a policy of CERCLA to promote fair and
16 equitable apportionment of liability among responsible parties,
17 as Conservation Chemical recognizes. The rule of the Uniform
18 Comparative Fault Act, approved in Conservation Chemical, supports
19 this policy because it reserves the determination of the settling
20
21

22 ^{13/} In Mardan, a property owner who had been assessed response
23 costs sought contribution from a prior owner of the property.
24 The prior owner asserted that the plaintiff had released all
25 claims against him by a general release provision in the land
26 purchase agreement. The issue was whether the release was appli-
cable or enforceable as to the CERCLA contribution claim, and
whether the determination of that issue was governed by state or
federal law.

1 defendant's proportionate share of liability until trial, when
2 all the evidence is available. However, CERCLA also has, as an
3 equally fundamental objective, the prompt and effective cleanup
4 of contaminated sites. Mardan, 804 F.2d at 1455; Conservation
5 Chemical, 628 F. Supp. at 404 ("obviously, the fundamental pur-
6 pose of CERCLA is to provide for the expeditious and efficacious
7 cleanup of hazardous waste sites"). The rule adopted should not
8 go so far in seeking exactitude in apportionment of liability
9 that it discourages or impedes settlements which will provide
10 funds for prompt cleanup.

11 While the rule of the Uniform Comparative Fault Act promotes
12 an exact apportionment of liability, it does not adequately carry
13 out the policy of CERCLA to promote prompt and efficacious
14 cleanup, because it would tend to discourage settlements. Under
15 the UCFA rule, a plaintiff contemplating a settlement cannot know
16 the effect of a settlement on his claim because the offset
17 against his claim will depend upon the settling defendant's pro
18 rata liability share as determined at trial. The rule of
19 Section 4 of the Uniform Contribution Among Tortfeasors Act
20 (UCATA), which provides for release of contribution claims and an
21 offset in the amount of a good-faith settlement, was formulated
22 in part because the procedure of establishing offsets by propor-
23 tional liability determinations at trial had discouraged settle-
24 ments. Comments to UCATA § 4. See also A Right of Contribution
25 under CERCLA: The Case for Federal Common Law, 71 Cornell L.
26 Rev. 668, 682-84 (1986). However, UCATA § 4 does not suffi-

1 ciently carry out CERCLA's purpose to fairly and equitably appor-
2 tion responsibility among defendants since the offset would
3 merely be determined by the amount of the settlement.

4 If a uniform federal rule is necessary or desirable, the rule
5 adopted should reflect a reasoned accommodation of both purposes
6 of CERCLA. The rule embodied in RCW 4.22.060(2) accomplishes
7 this goal. The Washington statute promotes settlements (and thus
8 prompt cleanup), first, by providing for dismissal of contribu-
9 tion claims, thus providing repose for the settling defendant,
10 and second, by establishing the amount of the offset at the time
11 of the settlement, thus allowing a plaintiff to know what the
12 effect of the settlement on his claim will be. The Washington
13 statute, as interpreted by Glover, also carries out CERCLA's pur-
14 pose to equitably apportion responsibility among the defendants,
15 since the Glover factors which govern the reasonableness deter-
16 mination take into account the factors (damages, merits of
17 liability theories, relative fault, strength of defenses, etc.)
18 which bear upon proportional liability, and the trial court has
19 discretion to increase the offset against the plaintiff's claims
20 if the settlement is unreasonable.

21 Thus, it is unnecessary to decide whether the content of the
22 federal common law which governs this issue should incorporate
23 state law, or whether a uniform federal rule should be
24 established. Because I conclude that the procedure embodied in
25 RCW 4.22.060(2) is the best model for a uniform federal rule, the
26 result is the same under either alternative. The settling defen-

1 dants are entitled to dismissal of CERCLA contribution claims
2 against them, and the offset will be established in the amount of
3 the settlements or such other amounts as are determined by the
4 court to be reasonable.^{14/}

5 V.

6 EFFECT OF BOEING SETTLEMENT ON REMAINING RICO DEFENDANTS

7 In settling with Boeing, plaintiffs for the first time
8 settled RICO claims. The question thus arises whether, under
9 RCW 4.22.060(2), the settlement extinguishes rights of contribution
10 by other RICO defendants against Boeing. Plaintiffs request an
11 order dismissing any contribution claims under 18 U.S.C. § 1961
12 et seq. ("RICO"). Plaintiff argues, and the Defense Liaison
13 Committee does not dispute, that there are no rights to contribu-
14 tion under RICO. Defendant Ryan & Haworth argues, however, that
15 if any non-settling defendant can prove RICO cross-claims, they
16 should be permitted to proceed with those claims regardless of
17 this court's determination on plaintiff's motion for a deter-
18 mination of reasonableness of the settlements.

19
20
21 ^{14/} Although I do not need to decide the issue in view of the
22 conclusion reached, the Kimbell Foods tests would not in my opin-
23 ion call for adoption of a uniform federal rule. The scope of
24 liability under CERCLA requires a nationally uniform body of law,
25 so that businesses dealing in hazardous wastes are not encouraged
26 to locate in states with more lenient liability laws. However,
disparate treatment of the effect of a partial settlement on
contribution rights among defendants will not frustrate specific
objectives of CERCLA, or impose any particular burden on com-
merce.

1 The decided cases hold that there are no contribution rights
2 under RICO. See Jacobson v. Western Montana Production Credit
3 Association, 643 F. Supp. 391 (D. Mont. 1986); Seminole Electric
4 Cooperative, Inc. v. Tanner, 635 F. Supp. 582 (N.D. Fla. 1986);
5 Delta Holdings, Inc. v. National Distillers and Chemical
6 Corporation, CCH Fed. Sec. Law Rptr. ¶92,910 (D.C. S.D.N.Y.
7 Sept. 4, 1986); Miller v. Affiliated Financial Corporation, 624
8 F. Supp. 1003 (N.D. Ill. 1985); Boone v. Beacon Building
9 Corporation, 613 F. Supp. 1151 (D.C. N.J. 1985). The civil reme-
10 dies provision of RICO, like the Clayton Antitrust Act, provides
11 for treble damages. The existence of this remedy, coupled with
12 the absence of any reference to contribution rights in the
13 legislative history, compels the conclusion that no rights of
14 contribution exist. Seminole Electric Cooperative, Inc. v.
15 Tanner, 635 F. Supp. 582, 583-85 (N.D. Fla. 1986). As explained
16 by the Supreme Court in the context of the antitrust statutes:

17 The very idea of trebling damages reveals an
18 intent to punish past, and to deter future, unlawful
19 conduct, not to ameliorate the liability of wrongdoers.
20 The absence of any reference to contribution in the
21 legislative history or of any possibility that Congress
22 was concerned with softening the blow on joint wrong-
23 doers in this setting makes examination of other factors
24 unnecessary. 451 U.S. at 639, 101 S. Ct. at 1066.

21 Texas Industries, Inc. v. Radcliff Materials, Inc., 451 U.S. 630,
22 639 (1981).

23 Thus, dismissal of contribution cross-claims under RICO is
24 appropriate.

25 . . .
26

VI.

ORDER

1. The settlement agreements between plaintiffs and the defendants listed on Exhibits A and B hereto are declared reasonable pursuant to RCW 4.22.060.

2. All of plaintiffs' claims and all cross-claims against the defendants listed on Exhibits A and B hereto, EXCEPT claims for damages or contribution against the defendants listed on Exhibit B resulting from the contamination of the approximately three acres of Standard Equipment, Inc.'s property known as the LIDCO site or for costs or contribution related to the cleanup of hazardous substances from the soil and groundwater on the LIDCO site, are dismissed with prejudice.

3. The offsets against plaintiffs' claims by reason of the settlements which are the subject of this order are established as follows:

(a) On claims related to Western Processing,
\$4,407,589.50; and

(b) On claims related to the LIDCO site, \$14,694.25.

DATED: September 11, 1987

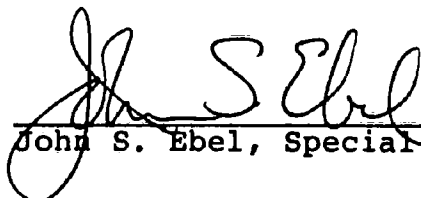

John S. Ebel, Special Master

EXHIBIT A

1
2 Advance Electroplating, Inc.
3 Advance Hardchrome, Inc.
4 Alaskan Copper Companies, Inc.
5 Anchor Post Products
6 Armco (Hitco Division)/Owens-Corning Fiberglass
7 Art Brass & Plating Works
8 B.C. Ferry Corporation
9 Bellevue School District #405
10 Browning Ferris Industries/Browning Ferris Industries Chemical
11 Services, Inc.
12 CF Tanklines/Matlack
13 Chevron Corp./Chevron U.S.A., Inc.
14 Chromium Co., Inc.
15 City of Sumner (Fire Dept.)
16 Color Your World/Tonecraft Paints, Ltd.
17 Columbia Paint Co.
18 Economics Laboratory, Inc.
19 Erdahl Brothers Trucking, Inc.
20 Fruehauf Division/Freuhauf Corporation
21 Futura Home Products/Colortrym
22 General Plastics
23 G.M. Nameplate
24 Guardsman Chemicals, Inc.
25 H.W. Blackstock Co.
26 Highline Community College
Hooker Chemicals and Plastics, Inc. (Occidental Chemical
Corporation
Industrial Plating Corporation
Industrial Transfer & Storage Co., Inc.
Inland Transportation Co., Inc.
Inmont Division/BASF Corporation
J.H. Baxter & Company
J.M. Martinac Shipbuilding
Josephs Simons and Sons, Inc.
L.F.R. Knudsen Company
Ludtke Pacific Trucking, Inc.
Lynden Transport, Inc.
Marine Iron Works, Inc.
Mastercraft Metal Finishing
Morton Thiokol, Inc. (Ventron Division)
M.T.H. Finishers, Inc.
Nemco Electric Co.
Norfin International, Inc./Norfin, Inc./Collator
Nuclear Pacific, Inc./VIOX Corporation
Oxygen Sales & Service, Inc.

1 Pacific Western Engineering Corp.
Pascal Company, Inc.
2 Pay'n Save Corporation
Pennwalt Corporation
3 Physio Control
Port of Seattle — Shilshole Bay Marina
4 Renton-Issaquah Auto Freight, Inc.
Ryder/P.I.E. Nationwide, Ince.
5 Safety-Kleen Corp.
Scott Galvanizing Co.
6 Seattle Disposal Co.
Seattle Times
7 State of Washington, Department of Labor & Industries
State of Washington, Department of Natural Resources
8 Tacoma Moving & Storage Co.
Tam Engineering Corp.
9 The Austin Company
The Barthel Co.
10 The Boeing Company
Transco Northwest, Inc.
11 Vacuum Truck Service
Vanguard Coatings and Chemicals, Ltd./The Fletco Co.
12 Valley Enameling
Western Furnaces, Inc.
13 Western Pneumatic Tube Co.
Western Wood Preserving Co.
14 W.R. Grace & Co.
Kent School District #415
15 R.W. Rhine, Inc.

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26 Exhibit A, p. 2

EXHIBIT B

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2 Avtech Corporation
Data I/O Corporation, Inc.
3 Jarvie Paint Manufacturing Co., Inc.
Lake Union Drydock Company
4 Pittsburgh & Midway Coal Mining Co.
Quality Finishing, Inc.
5 Rockcor, Inc.
Sundstrand Data Control, Inc.
6 Universal Manufacturing Corporation
Vanguard Coatings and Chemicals, Ltd./The Fletco Co.
7 Western Gear Machinery Corporation
Red Dot Corporation
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Exhibit B